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No. 97-1121

In The

Supreme Court of the United States

October Term, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF *AMICUS CURIAE* OF THE ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Is Chicago's Gang Congregation Ordinance (Chi.Mun. Code, Sec. 8-4-015 (June 17, 1992)) unconstitutional because it seeks to impose criminal penalties based solely on an individual's status, rather than upon any affirmative misconduct in which that individual may be involved, without providing a clearly understood standard of conduct, thus trammeling upon rights contained in the Federal and Illinois Constitutions?

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INTERESTS OF AMICUS CURIAE

The Illinois Attorneys For Criminal Justice (hereinafter "IACJ") is an association of criminal lawyers concerned with the preservation of justice in Illinois courts. IACJ is dedicated to fostering, maintaining and encouraging the integrity, independence and expertise of criminal defense lawyers. The mission of the IACJ is to preserve the adversary system of justice and to ensure due process for persons accused of crime. IACJ membership is limited to practitioners engaged in defense of the accused. Simply put, the IACJ membership consists of attorneys practicing in the criminal courts on a daily basis, confronting the reality of laws such as Chicago's Gang Congregation Ordinance.[1]

SUMMARY OF ARGUMENT

While no one, least of all the IACJ, questions the danger posed by criminal street gangs in the City of Chicago, the fact remains that any effort to control their pernicious conduct must comport with our Constitution. Both the Illinois Appellate and Supreme Courts found the city's Gang Congregation Ordinance (Chi.Mun.Code, Sec. 8-4-015 (June 17, 1992)) deeply offensive to the Federal and Illinois State Constitutions for a litany of reasons. When all these various failings are distilled down to their essentials, one central flaw is crucial: the Ordinance is not triggered by any specific misconduct of either gang members or of mere citizens found in their proximity; instead, the Ordinance which commands their compliance is conditioned on status.

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[1] The parties have consented to the filing of this Brief. Copies of the consent letters have been lodged with the Clerk of this Court. This Brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, its members, and their counsel, have made monetary contribution to the preparation and submission of this brief.

A generation ago, in *Robinson v. California*, 370 U.S. 660 (1962) addressing an equally grave problem (drug addiction), this Court condemned status-based statutes requiring no misconduct to sweep an accused within its penal net. Subsequently in *Powell v. Texas*, 392 U.S. 514 (1968), this Court indicated that where status is linked to conduct, a statute may survive constitutional scrutiny. But the requirement of some form of conduct warranting application of criminal sanction is one deeply rooted in this Court's jurisprudence (see, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (striking a similar statute directed against gangs on vagueness grounds); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (striking on vagueness grounds an ordinance purporting to regulate street annoyances)). The common factor linking all these cases (as well as those cited by Petitioner) is that a statute must specify some form of conduct, with enough particularity, that the average citizen is given notice of what conduct he must avoid, and the police are given some guidance to prevent wholly arbitrary enforcement.

Here, the Ordinance does not predicate its operation on any conduct; in fact, in fashioning the Ordinance the Chicago City Council expressly bemoaned the fact that actual criminal conduct was shielded from police action. Thus, the city fashioned a new tool to add to the police arsenal: the ability to enforce the shunning of gang members based purely on their status. The Ordinance is inert in the absence of a gang member. If one is present, however, the Ordinance comes to life, sweeping up all gang and non-gang members in its path.

The absence of a conduct element thus opens the door to the plethora of problems that have long deprived such statutes of constitutional support: a lack of notice to citizens who must conform with the law; and a wholesale grant of law-making power to the police, both as an institution and individually. It is, after all, the police who internally determine who is a gang member; these determinations are not part of the Ordinance, and hence are

outside even the constructive knowledge of the public. It is the police who determine, again *sub rosa*, what parts of the city will be subject to enforcement of the Ordinance, and when such enforcement shall be applicable. It is the police who determine whether anyone, gang member or not, has an apparent purpose for his or her presence in any particular public place. And indeed, even the city admits that under the Ordinance, a non-gang member who is doing absolutely nothing illegal may be forced to surrender his spot in the public way simply because a police officer sees another person he subjectively believes is a gang member nearby.

The city's parallel rejection of the status-driven basis of its Ordinance is similarly strained. The city claims that there is a conduct element: the failure to comply with a police order to leave. But as the police only issue this order where a gang member is present, regardless of conduct leading to the order, the status nature of the Ordinance remains clear.

The Ordinance simply defies this Court's rulings, creating a status-based offense which neither provides notice to the public nor guidance to the police. The courts below should be affirmed accordingly.

ARGUMENT

No one disputes the laudable goal of making the streets safer for the citizens of the City of Chicago, or anywhere else. Promotion of public safety and welfare are, after all, central purposes of any democratic government, and the basis for the delegation of generalized police powers to that government. But promotion of these goals ought not be done at the expense of basic freedoms that governments are bound to protect: those of association and assembly, and those indelible rights to allow the citizens of this country to move about the public way unimpeded by other citizens, law enforcement, the military, members of any political or social group, etc. This country was founded upon principles that all are created

equal and all share equal rights and equal privileges. The courts of this country have and must continue to safeguard these rights, rights that belong to *all*, including gang members or those standing nearby. That is the foundation of our concept of a republic.

The City of Chicago's Gang Congregation Ordinance (Chi.Mun. Code, Sec. 8-4-015; hereinafter, "Ordinance") is of grave concern for a myriad of reasons, many detailed in the decisions of the Illinois Supreme Court (*People v. Morales*, 177 Ill.2d 440, 687 N.E. 2d 53 (1997) and the Illinois Appellate Court (*People v. Youkhana*, 277 Ill.App.3d 101, 660 N.E.2d 34 (1st Dist. 1995)). Although the particular problems prompting the instant *amicus* brief are as wide-ranging in their effect as those examined by the Illinois state courts, the focus here is narrower: the IACJ is most concerned because the ordinance represents a sea-change in method. The Ordinance jettisons any requirement that police action be conditioned on any misconduct, focusing instead on the perception that mere gang status is actionable. The Ordinance becomes even more odious when applied to non-gang members: their liberties are truncated without reference to either their conduct or their status. They are merely in the wrong place at the wrong time.

I. THE ORDINANCE IS STRUCTURED TO RESTRICT A NON-GANG MEMBER'S LIBERTY TO ENJOY THE AMENITIES OF THE CITY BASED UPON THE STATUS OF THOSE IN PROXIMITY TO HIM

In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972), this Court extolled the virtues of walking, strolling, wandering, loafing and loitering as "historically part of the amenities of life as we have known them." No doubt, at some point most citizens of Chicago take the time to simply cast back and gaze at the skyline, enjoy the night air, or otherwise loiter for the pleasure of inactivity. Under the Ordinance, their ability to so enjoy the city is

eroded, ironically in the name of protecting their very ability to enjoy the pleasures of such tranquility. The Ordinance renders the lay citizen's right to stand and watch dependent, not on any conduct of his own, but on his mere proximity to someone else.

The framework adopted by the City Council is rather simple, contemplating a two-step process: identification and subsequent police action. The Ordinance recites:

> "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section" (Chi.Mun.Code, Sec. 8-4-015(a)).[2]

Phrased simply, whenever a police officer sees two or more people, any of whom he subjectively believes is a gang member, he may order everyone to disperse if he fails to perceive a rationale for their presence in the public way. Under the Ordinance, this dispersal order affects not only the perceived gang member, but also the

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[2] The Ordinance defines "loiter" as staying in any one place without apparent purpose (Chi. Mun. Code, Sec. 8-4-015(c)(2)). A "criminal street gang" is defined as:

> "any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more [enumerated criminal acts] and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity" (Chi. Mun.Code, Sec. 8-4-015(c)(2)).

A "public place" is similarly broadly defined to encompass the public way and any other location open to the public, whether publicly or privately owned (Chi. Mun.Code, Sec. 8-4-015(c)(5)).

wholly innocent bystander who may find himself in proximity to the purported gang member. Failure to comply may result in arrest, jail and/or a fine.

The simplicity of the Ordinance conceals a wealth of nuance and subtlety. For example, the Ordinance is not designed to apply throughout the city. General Order 92-4, promulgated under the Ordinance, vests in "district tactical officers and other personnel with knowledge of gang activities" the authority to designate areas for application of the Ordinance (Gen.Order 92-4, VI(A)(1)). Because this designation is dependent, in part, on crime pattern information (Gen.Order 92-4, VI(A)(2)(a)), it is likely that such designations will be transient. Assuming that police enforcement is designed to reserve in the police the element of surprise (and the General Order only directs that area designations be disseminated to the Gang Crimes Section (Gen.Order 92-4, VI(A)(4))), this information will not be publicly disclosed.

Nor is the area of enforcement the only hole card held by the police under the Ordinance's structure. The Ordinance and General Order also make a shell game of gang membership status. The General Order confers on certain officers the power to act as magistrate, making probable cause determinations of membership status. Although couched in terms of probable cause, the General Order does not contemplate any prior judicial review of those determinations.[3]

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[3] Section V of the General Order merely provides some criteria for the police officers' determination, including:

A. the individual's admission of membership.

B. the wearing of distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, but only when such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang, and membership may not be established solely because an individual is wearing clothing available to the general public.

C. The use of signals or symbols distinctive of a specific criminal street gang.

D. the identification of the individual as a member of a specific criminal street gang by an individual who:

1. has provided reliable information to the Department in the past or whose information can be independently corroborated; and

2. alleges that the individual in question is a member of a specific criminal street gang. (Gen. Order 92-4, Part V)

Nowhere is there any suggestion that this "probable cause determination" be submitted to an impartial magistrate as a condition precedent to the officer's authority to order otherwise law-abiding citizens to leave a public place. While the Ordinance makes the absence of a gang member an affirmative defense (Sec. 8-4-015(b)), the General Order effectuating the Ordinance shelters the gang information files (and hence the probable cause determination) from public disclosure absent a court order.

Thus, the Ordinance and the enabling General Order structurally are designed to insulate the public from knowing either where the Ordinance will apply, or whom they must avoid. In substance, and by design, the Ordinance attempts to attach to gang members a "Scarlet Letter," and by doing so vest the police with the power to order their shunning by the public. While this may be an honored tradition in some circles, it holds no parallel in American law. This effort to criminalize status in lieu of any action or misconduct is most troubling, and dangerous. When analyzed logically, it reveals all of the inherent problems that deprived the Ordinance of constitutional support at all levels of the Illinois judicial system.

II. THE ORDINANCE IS NOT INTENDED TO DIRECTLY ADDRESS ANY CRIMINAL ACTIVITY. INSTEAD, IT IS INTENDED AS A TOOL FOR THE POLICE TO BE USED IN THE ABSENCE OF EVIDENCE OF CRIMINAL ACTIVITY.

As noted in the debates before the Chicago City Council, it is sometimes difficult to reach beyond the actual criminal activities of gangs and attack them "in utero" – because of the criminal nature of their acts and the insularity of their organization, a street gang is difficult, sometimes surpassingly so, to address. And to be sure, addressing such entities after they have committed criminal acts, while essential to ordered liberty, is painfully too late for those who suffer from their predations. Thus the IACJ does not quarrel with the idea that legislative bodies must be given some rein within which to seek answers to those problems, and to experiment with varied approaches to specific problems in an effort to reach a fair and just result. But it is crucial to realize that experiments fail. The IACJ would respectfully suggest that, viewed in light of our nation's greatest success, the Constitution and its careful balancing of individual and societal needs, the instant Ordinance is a failure.

This Ordinance is predicated on two premises: first, that the subjective perception of gang status by a police officer is actionable by itself; and second, that once such perception is subjectively realized, the State may take action affecting both the putative gang member and the public, wholly outside the judicial process. As addressed below, neither premise is constitutionally sound.

Viewed in this vein, it is clear that the Ordinance is completely status-driven. In its preamble, the Chicago City Council made no bones over this fact; it frankly confessed that the problem of dealing with gangs based on their conduct was beyond its ability to control:

> "WHEREAS, the City of Chicago, like other cities across this nation, has been experiencing

> an increasing murder rate as well as an increase in violent and drug related crimes; and
>
> WHEREAS, the City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and
>
> WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and
>
> WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and
>
> WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and
>
> WHEREAS, the City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and
>
> WHEREAS, the City also has an interest in discouraging all persons from loitering in public places with criminal street gang members; and
>
> WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear" . . . (Chi.Mun. Code, Sec. 8-4-015)

Faced with the inability to curb activity based on conduct, the City Council fashioned an entirely new tool: pre-emptive dispersal based on status.[4]

The fact that the Ordinance does not address any criminality is borne out by both practical reality and the City's own brief. Any police officer that has knowledge of criminality, it must be assumed, would do more than ask the offenders to leave. He would make an arrest. Under the Ordinance, the officer does not make any arrest unless his dispersal order is defied. The officer's own conduct initiates the crime; if his order is obeyed, by definition, no crime is committed. Thus the Ordinance operates in the absence of crime.

The City echoes this in its brief:

> "[the Ordinance] infringes on the 'liberty' to use the public ways only to a limited extent – even known gang members can loiter alone, and they can loiter with others as long as they move along when ordered. While the Illinois Supreme Court was troubled that the ordinance was not limited in its scope to persons loitering to engage in illegal activity, the mere potential for a prophylactic enactment to reach 'innocent' conduct does not give rise to a substantive due process violation" (Pet. Br., p. 12)

The utter absence of any criminality (or to phrase it in the affirmative, that the Ordinance is triggered by status) yields a plethora of constitutional problems:

a. The Notice Problem: The Ordinance hangs on the meaning of the term "loiter." But as the City admits, it is not loitering that is the target

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[4] Curiously, although the city counsel proclaimed that "members of criminal street gangs avoid arrest by committing no offense . . . when they know the police are present . . . " enforcement is limited by General Order 92-4 to tactical and gang crime officers, all of whom typically work in plainclothes and undercover, i.e., hiding their presence.

of the Ordinance, it is the presence of a gang member. Viewed from the perspective of the non-gang member/citizen, how can he ever determine, before the police interject themselves and direct him to surrender his place in the public way, that he is even in proximity to a gang member? This is an impossibility given that the police guard their internal files defining gang members – that is, the Ordinance is structurally incapable of affording citizens notice of what standard of conduct they must comply with;

b. The Vagueness Problem: Even if the Ordinance gave citizens the kind of notice this Court's decisions require, it still suffers from the defect of vesting such unbridled discretion in the police officer that the Ordinance means whatever any particular police officer, on any given day, thinks it means. What constitutes an "apparent purpose" such that the group is not loitering? How much information is necessary before a police officer can justifiably conclude that at least one member of that grouping is a gang member? What constitutes prompt dispersal? For example, if the police demand dispersal, and only the suspected gang member leaves, can the otherwise innocent citizens still be arrested for their failure to comply? The literal language of the Ordinance says yes – but this turns the Ordinance directly against its purpose, protecting the ability of the innocent to enjoy his or her own neighborhoods.

c. The Overbreadth Problem: The Ordinance casts a wide net, sweeping innocent conduct, and catching innocent citizens, in its web.

These points are addressed in more detail in ensuing sections of this Brief.

III. THE ORDINANCE IS AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER IN THAT IT SEEKS TO PENALIZE INDIVIDUALS BASED UPON THE MERE PERCEPTION OF "GANG" STATUS, RATHER THAN BASED UPON ANY MISCONDUCT COMMITTED BY GANG MEMBERS, THUS RENDERING CITIZEN COMPLIANCE WITH ITS DICTATES VIRTUALLY IMPOSSIBLE.

As noted, the IACJ makes no brief favoring street gangs and their activities; their *criminal actions* are fitting subjects for application of the criminal law. The core problem with the Ordinance is that it is totally divorced from those activities – the Ordinance reads as if the Chicago City Council figuratively threw up its hands in frustration and declared that all associations that include a single gang member are illegal. While this determination may be founded on a real concern, its design is deeply offensive to our Constitution, and cannot withstand scrutiny.

A. The Concept Of Criminalizing Status, Independent Of Any Criminal Conduct, Has No Basis In American Criminal Law.

It scarcely requires citation to assert that criminal jurisprudence is conduct-driven: it seeks to punish what society regards as wrongful conduct, and in so doing deter such misconduct. But the criminal law does not punish mere thought, nor is "guilt by association" a recognized basis for the imposition of criminal sanctions. As this Court said in *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980), "in the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur." This fundamental idea is so fundamental that, as the *Apfelbaum* Court noted, it has found expression in the works of Shakespeare, who wrote:

> "His acts did not o'ertake his bad intent;
> And must be buried but as an intent
> That perish'd by the way: thoughts are no subjects,
> Intents but merely thoughts."
> (Shakespeare, *Measure For Measure*, Act V, Scene 1).

In *Apfelbaum*, Your Honors noted that the Bard had expressed "sound legal doctrine" in this passage (445 U.S. 115, 131, n.13).

Similarly, no less a legal scholar than Justice Oliver Wendell Holmes observed in *The Common Law*:

> "It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" (Holmes, Oliver Wendell, *The Common Law*, pp. 49-50; emphasis supplied).

The unifying fact in both *Apfelbaum* and Justice Holmes' formulation is that criminal statutes focus on conduct, not status.

The criminalizing of status has a failed history in our jurisprudence. A clear understanding comes from the juxtaposition of two cases, *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968). In *Robinson*, this Court addressed a California statute making it a crime simply to be a narcotics addict. Conviction did not require that the accused engage in any misconduct within California's jurisdiction (for example, he could have acquired his addiction elsewhere and then moved within the jurisdiction, and this Court was at pains to note that actual conduct, such as possession, use and sale of narcotic drugs were separately criminalized); the mere status of addict was sufficient to warrant the

imposition of a criminal sanction. This Court, after noting the many ways in which a State may legitimately address the abhorrence of drug usage and its consequences in society, characterized the statute as follows:

> "[t]his statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' " (370 U.S. 660, 666).

Given that addiction could be innocently acquired (as in the case of pre-natal addiction from a mother's drug usage), this Court struck down the statute in a due process/cruel and unusual punishment analysis:

> "A state law which imprisons a person thus afflicted [that is, an addict] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment" (370 U.S. 660, 667).

Phrased alternatively, this Court insisted that, constitutionally, the imposition of criminal sanction be linked to conduct, rather than hanging on mere status, despite the overwhelming societal need to address the scourge of drug addiction.

This requirement of some misconduct as a predicate to the imposition of any criminal sanction was hammered home in the succeeding *Powell* opinion. There, the accused sought safe harbor in the logic of *Robinson* by characterizing his alcoholism as a parallel disease to drug addiction, asserting that his conviction for public drunkenness could not stand consonant with *Robinson*'s holding. This Court distinguished *Robinson*, stating:

> "On its face the present case does not fall within that [*Robinson*] holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper . . . ' " (392 U.S. 514, 532).

Notably, as this Court emphasized, the "status" of being drunk was linked with an *actus reus* – being in public while inebriated, and thus presenting a danger to one's self and others (for example, keeping drunks off the street while so impaired, a valid safety concern). Justice Black, writing for himself and Justice Harlan, went directly to this point in his concurrence, wherein he said:

> "Punishment for status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy and recidivist crimes." (392 U.S. 51, 543).

Thus, *Powell* stands in sharp contrast to *Robinson*, for while the latter imposed sanction solely for status, the former did not. And lest anyone assert that there is a valid analogy to being "in public" while drunk and being in public while "a gang member," it bears mention that the accused inebriate need only sober up; under the Ordinance, one is a gang member until such time as the police, subjectively, determine otherwise. Moreover, the Ordinance applies to non-gang members with the same force.

In the Ordinance's formulation, wholly absent are any of the timeworn protections of citizens from even slightly intrusive police conduct: reasonable suspicion to warrant so-called "*Terry*-stops" (*Terry v. Ohio*, 392 U.S. 1 (1968)). Indeed, the Ordinance is designed to operate only where all such indicia warranting a police intrusion into a citizen's freedom are absent; obviously, if the police had facts supporting a *Terry*-stop or an arrest, they would pursue those options, rather than rely on the Ordinance to merely force people to move along. By design, the Ordinance is a tool allowing the police to disperse law-abiding citizens regardless of any criminal conduct. In the City of Chicago, where a former mayor once proclaimed "the police aren't here to create disorder; they're here to preserve disorder," placing this tool in the hands of the police comes freighted with significant weight.

Petitioners, naturally, dispute that the Ordinance is status-driven. In fact, the City has constructed an elegant legal ballet to disguise the role status plays in the Ordinance. The City posits a three-step process in police-citizen confrontations: first, the police officer, having probable cause to believe that at least one member of the gathering is a gang member, merely inquires into the reason for the gathering; second, the officer then determines if the gathering has any legitimate reason; and third, if there is no legitimate reason, he directs the gathering to disperse. It is only if this order is disobeyed that an arrest occurs (Pet. Br., p. 45). Distilled to its

essentials, the City's calculus asserts an anticipatory police role:

> "A collection of brazen, disorderly and visibly lawless persons on the public ways intimidates residents, detracts from property values, and ultimately destabilizes communities. The gang loitering ordinance and similar laws give the authorities a way to address this type of civil disorder. Such laws achieve an important prophylactic objective as well – because when police officers can order gang members to move along, they can prevent crime before it occurs." (Pet. Br., pp. 9-10).

This structure, of course, ignores a key reality: if the gang members are "disorderly and visibly lawless" they could be prosecuted for that conduct. The Ordinance operates only when the police lack evidence of such criminality, and thus its focus is purely one based on status, and association.

Accepting the City's formulation of the Ordinance does not answer the Ordinance's lack of constitutionality under the Fourth and Fourteenth Amendments, both failures arising from the basis for the initial confrontation. The Ordinance operates only where no crime has occurred, for if there was probable cause (or even a reasonable suspicion) the police could act under existing law. That all the police do is order dispersal thus lends the lie to the use of any probable cause determination, and establishes the status-driven nature of the Ordinance.[5]

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[5] Consider, for example, two hypothetical situations: the police confront a group in the Englewood section of Chicago, all of whom are simply sitting on park benches and chatting, and not committing any criminal act. The officer subjectively believes that probable cause exists to conclude one of the group is a gang member. Under the Ordinance, he may direct their

B. The Ordinance Also Fails To Provide Either Notice To Citizens Of The Conduct To Be Avoided Or The Police With Specific Guidance On The Proper Application Of Its Goals.

While not every contact between the police and citizens implicates Fourth Amendment values, the dispersal order does – the group, suspected gang members and innocents, are compelled to surrender their place in the broadly defined public way. Petitioner maintains that there is no Fourth Amendment "seizure" because all are free (indeed, compelled) to leave (Pet. Br., p. 47). This is a tortured view of the freedoms protected by the Fourth Amendment. One is only "free" where one's choices are not artificially constrained, and the Ordinance deprives all people of one of their two choices: the option of staying.

The Fourteenth Amendment problem also affirms the status-driven nature of the Ordinance. Petitioner's brief focuses substantial effort to the issue of loitering; in their analysis, the mere fact of loitering is sufficient to permit the initial intrusion of the police:

> "The court below, however, identified no history, tradition, or practice of respecting a right to loiter. In fact, history and tradition are quite to the contrary. The drafters of the Model Penal Code, for example, comprehensively traced the history of loitering laws before recommending one of their own, and observed that such laws have a considerable pedigree – they were first

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dispersal. In the second situation, the grouping and their actions are identical, except that no member is believed to be a gang member. The officer is powerless to direct their dispersal under the Ordinance. The distinguishing factor is pure status.

> enacted to help feudal lords control their serfs, later expanded as a means of controlling often dangerous bands of the unemployed, and ultimately were adopted in 49 states by statute and the remaining one by common law . . . The Model Penal Code itself recommends a prohibition on loitering under circumstances that reasonably warrant alarm for the safety of persons and property . . . " (Pet. Br., p. 41).

Several rejoinders to this reasoning are necessary.

> a. It is a curious argument which seeks to justify the Ordinance as the progeny of feudal tradition, or as a current mutation in this hemisphere of ancient British class warfare designed to hold the dispossessed, unemployed flotsam of the industrial revolution in check. It is surpassingly unlikely that either feudalism or the British experience during the industrial revolution were ever measured by a court of law applying the Fourteenth Amendment.
>
> b. Second, the argument ignores the fact that such laws have been tested under that amendment, and failed (*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which struck down a similar Jacksonville statute as offensive to due process of law).

The latter point warrants some expansion. In *Papachristou*, this Court struck a vagrancy ordinance (the functional equivalent of a loitering ordinance) as unconstitutionally vague, as it ensnared both the innocent and the guilty, leaving it to the courts to sort out the resulting detritus. Crucial was this Court's reliance on Justice Frankfurter's dissent in *Winters v. New York*, 333 U.S. 507 (1948), wherein he wrote:

> "These statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . Definiteness is designedly avoided so as to allow the net to be cast large, to enable men

> to be caught who are vaguely undesirable in the eyes of the police and the prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." (quoted in *Papachristou* at 405 U.S. 156, 166).

This logic applies forcefully here. The flaw is two-fold: first, it affords citizens no clear standard to which they must conform their own conduct; and second, it vests such broad discretion in the hands of the police as to effectively make them super-legislators, defining what is criminal and what is innocent based on their own personal beliefs.

This Court has had many occasions to address similar statutory schemes. The general rule was succinctly stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), where this Court stated:

> "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give men of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

The Ordinance bears a striking resemblance to the statute held unconstitutionally vague on this basis in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). There, New Jersey sought to control the gangs of its day with these words:

> "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or any other State, is declared to

> be a gangster . . . " (Sec. 4, R.S.N.J. 1937, 2:136-4, c. 155, Laws 1934).

In striking this statute, this Court condemned the loose language of the statute:

> "The state court did not find, and we cannot, that 'gang' has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or anything that is unlawful." (306 U.S. 451, 457).

This Court summarized by stating that a law which does not condemn any particular act or omission is too vague to survive due process analysis.

A similar analysis is found in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). There, a city law made criminal any gathering of three or more people in specified public areas who conducted themselves in a manner "annoying" to others; this Court held it unconstitutional on its face, as the term "annoying" was too vague to provide any standard of conduct other than whatever any particular police officer believed was annoying to him (402 U.S. 611, 614). This Court trenchantly noted that the fact that some conduct could be subjected to statutory control was insufficient to save the law:

> "It is said that the ordinance is broad enough to encompass many types of conduct within the city's constitutional authority to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." (402 U.S. 611, 614).

This confirms the conduct-driven nature of penal statutes analyzed in the previous sub-section of this Brief, and also conforms to the notice and vagueness requirements underlying *Papachristou*, *Grayned*, and *Lanzetta*.

Viewed through this prism, the ordinance on its face begs many questions:

A. What does loitering mean? "Loiter," according to the city, means "to remain in any one place with no apparent purpose". On its face this definition of loitering means anyone not standing at a bus stop within sight of an approaching bus or elsewhere on the "public way" with a billboard slung over their shoulders announcing their purpose, could reasonably be believed to be loitering. The Ordinance leaves it to a police officer to determine whether someone's purpose in being in public is "apparent". As noted, such discretion, leaving enforcement to the predilections of the policemen on the street has routinely and appropriately been found unconstitutionally vague. *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 1248 (1974).

The Ordinance does not require the officer to conduct any reasonable investigation before making his dispersal order, nor does it require that the officer determine if there is some permissible, albeit not readily apparent, purpose. And what is meant by "disperse and remove themselves from the area". The plain meaning to the words in the Ordinance leads to the inescapable conclusion that it is impossible to comply with provisions of the Ordinance.

The city writes that the ordinance "is not directed at 'speech'; indeed, the ordinance applies whether or not loiters are speaking". Pet. Br., p. 19. One must ask then ask: if two or more people are speaking while standing in public is not their purpose apparent? Obviously, they are having a conversation. Unless conversation is somehow illegal in parts of Chicago, this very action should, logically, exclude them from the scope of the ordinance. Why then is the city telling this Court that these people, not

committing any apparent crime, merely having a conversation while standing on the sidewalk or in a park, fall within the scope of the Ordinance? Should a police officer have a right to approach these people and tell them they must move on? Why? What crime are they committing? What apparent crime are they committing? Indeed, what suspicious activity are they even engaged in?

B. What is required to "promptly obey"? There is no time standard defining the term. How quickly must one "promptly obey" the order to disperse? *Smith v. Goguen*, 415 U.S. 566 (1974).

C. The Ordinance is subjective in that it allows a police officer unfettered discretion to determine whether "he (the officer) reasonably believes [the individual] to be a criminal street gang member". Even though the General Order requires the maintenance of files identifying gang members, the sheer volume suggested by the city indicates that no police officer can ever truly know who is, or is not, a gang member. Human memory simply does not allow for the retention of such voluminous information. Since it is a subjective and not objective standard, such as those applied in evaluating probable cause for an arrest, it is impossible to have any meaningful review of the officer's decision. The subjective beliefs of an officer are never, standing alone, accepted by this Court to override objective constitutional standards. In *Stansbury v. California*, 511 U.S. 318, 324, 114 S. Ct. 1526 (1994) this Court noted that officers subjective beliefs that a person was a suspect was not relevant to an objective determination as to whether or not the suspect was in custody. Similarly, while an officer's subjective observations can be considered in determining probable cause, the standard remains an objective one.

Nor is the definition of gang member the only vagary contained in the Ordinance. The Ordinance defines "criminal street gang" as an ongoing organization, formal or informal, having as one of its substantial activities the

commission of enumerated offenses (Chi.Mun.Code, Sec. 8-4-015(c)(2)). As this Court may be aware, the Chicago Police Department itself has been the subject of intense investigation, and its members prosecuted, by the U.S. Attorney for offenses enumerated in the Ordinance (see, e.g., *United States v. Jackson*, 1998 U.S. Dist. Lexis 3602 (March 23, 1998) (involving a prosecution for racketeering, robbery, attempted robbery, extortion and other offenses relating to police corruption and narcotics trafficking in Chicago's Austin Police District)). The Ordinance's definition arguably renders the Chicago Police Department itself a criminal street gang! This fact makes former Chicago Police Superintendent Leroy Martin's words eerily prophetic and discordant: "When you talk about gangs, I've got the toughest gang in town: the Chicago Police Department" (*Chicago Tribune*, November 3, 1987).

Regardless of the criteria and/or standards the fact remains that membership in a gang is not a crime. No matter how specific the criteria, they will encompass people who have not engaged in any illegal activity, people who are wearing clothing for no significant reason other than they like it, copy cats, and innumerable others. Included amongst the color schemes identified in the general order are those that signify many different high school, college and professional sports teams, Batman, several countries and/or ethnic backgrounds, and others. While the city argues that the clothing definition is tempered by other requirements, it is the clothing that is initially visible and therefore more likely than not the impetus of the contact.

D. The Ordinance punishes the innocent. The Ordinance merely requires that the policeman reasonably believes one person in a group of two or more to be in a criminal street gang. Based upon that person's association or membership the Ordinance gives the police the power to control the activities of others lawfully upon the public way, others whom the police do not suspect of engaging

in any unlawful activity, being a member of any gang, and who otherwise, but for their "association" with the suspected individual, could loiter. It gives the police the power to clear ordinary citizens from the streets. This is a power that has never been authorized by this or any other court. It is a power utilized in military dictatorships and third world nations, emblematic not of the rule of law, but of its absence. It is no different than the power utilized by the Nazis to rid the streets of Germany of entire groups, or that are utilized in the modern world to suppress dissent.

While a nice academic constitutional analysis can provide some support for the Ordinance, this Court should look at the practical applications of this Ordinance and not just at the few individuals cited as respondent herein. The city suggests that there were "some 45,000 orders to disperse" issued and obeyed and a like number of arrests for orders disobeyed. It is difficult to imagine where the city compiled their statistics on orders obeyed since the officer on the street does not note orders obeyed in any manner. Rather, it is respectfully suggested by amici, who are a large group of practitioners, speaking daily with those individuals who are the objects of over reaching on the part of the Chicago police, that there were far more contacts with individuals on the street then the city suggests.

This City notes on page 16 of its brief that in 1995 gang related homicides in Chicago dropped 26 percent, and increased by seven percent the following year, after the Ordinance was invalidated. The city writes that this decrease can be simply explained because "if fewer gang members are loitering in public where they constitute an inviting target for their rivals, fewer of them – and innocent people nearby – will be shot to death". This is of course exactly the kind of hypothetical application that the city later condemns. (Pet. Br., p. 22). It also makes the absurd suggestion that someone who is alone is safer than in a group, or near others.

In telling this Court that gang related homicides dropped, the city fails to define "gang related". This statistical analysis is therefore as vague as the ordinance itself. Looking at the city's figures, one cannot determine whether gang related refers to victims, perpetrators, or both. What is undisputed is that homicides in Chicago have continued to decline since 1995, after the police stopped enforcing the Ordinance. The statistics compiled by the Chicago police department, found on the police WebSite, demonstrate that crime in the City of Chicago is dropping, and continues to drop, even after the ordinance was properly found to be unconstitutional. One need only look at 1998 statistics to dispense with the city's argument:

- in July, homicides were down 21 percent from a five-year average;
- in June, homicides were the lowest since 1988;
- in April, homicides were a ten-year low;
- in March, homicides were below the five-year average;
- in February, homicides were the second lowest since 1986; and
- in January, homicides were the lowest in a decade.[6]

Constitutional issues have never been determined based on an "end justifies the means" mentality. We do not dispense with basic constitutional principles because statistics support erosion of individual rights. Validation of this Ordinance is but the tip of the iceberg, and individual rights the Titanic. If this Court allows the iceberg to sink the ship, then individual rights have begun to descend to the level of a police state.

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[6] A detailed statistical breakdown for each year can be found on the police WebSite. Also included in the site are the police superintendent's annual remarks, attributing the drop in crime to tougher gun laws.

IV. THE ORDINANCE SUBSTANTIALLY INFRINGES ON THE RIGHT OF ASSOCIATION ENJOYED BY ALL ILLINOIS RESIDENTS

The First Amendment recites that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Consider this in the context of *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937), one of the suppression of communism cases from that period. Oregon had enacted a "criminal syndicalism" law that proscribed, essentially, combinations that advocated crime, physical violence, sabotage, or any unlawful means of accomplishing or effecting industrial or political change or revolution, an eerie parallel to the Ordinance's treatment of street gangs. On this, this Court wrote:

> "[The] right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.
>
> "These rights may be abused by using speech or press or assembly in order to incite violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be

curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that the changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (299 U.S. 353, 365)."

The case itself dealt with a communist party meeting; it was the mere fact that it was organized by that party which resulted in the charge of criminal syndicalism; in effect, being a communist or associating with communists is what was being penalized, based on the belief that communist beliefs were, *a fortiori*, antithetical to the democratic system, and thus within the police power to proscribe, based on a person's holding communist beliefs alone. This Court went on to state:

"The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting was held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their *conspiracy* or other *violation* of valid laws. But it is a different matter when the State, instead prosecuting them for such offenses, seizes upon mere participation in

a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (299 U.S. 353, 365, emphasis supplied).

Comparison of that case to the facts here is revealing: no crime is allegedly committed (unless and until the dispersal order is ignored); it is the assembly itself that is criminalized. How can this be, consonant with the First Amendment?

Petitioner responds, with some potency, that the right of peaceable assembly and association does not exist in a vacuum:

"The final right that respondents have invoked, freedom of association, is not expressly protected by the Constitution. For this reason, the right to associate is protected only in two senses: when undertaken for the purpose of engaging in activities protected by the First Amendment . . . or when undertaken to engage in 'intimate human relationships' . . . " (Pet. Br., p. 20).

The fly in the ointment is the city's presumption that the First Amendment is the sole source of this right for due process purposes. Rights spring from various sources, including State enactments, which are enforceable under the due process clause.

Here, the answer is provided in the Illinois State Constitution, which recites:

"The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances." (Ill.Const. 1970, Art. I, Sec. 5).

Lest there be any confusion that this State-guaranteed right, like the Federal right, is conditioned on other rights, the Constitutional Commentary accompanying that provision is instructive:

"This provision is the same as Section 17 of Article II of the 1870 Constitution. A comma was

> inserted after 'manner' to assure that the right to assembly in a peaceful manner was an independent right, not subject to qualification by the succeeding phrases." (Smith-Hurd Illinois Compiled Statutes, Constitution, Art. I, Sec. 5, Constitutional Commentary).

Thus, even if the city is correct with regard to the First Amendment, the State's parallel right is equally enforceable in this Court. So analyzed, the Ordinance is still a substantial infringement on the rights of all, gang members and non-gang members, enforceable in this Court under the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons the ruling of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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